Muhammad Atam bin Abdul Wahab v Minister of Home Affairs & Anor

HIGH COURT (KOTA BHARU) — CRIMINAL APPLICATION NO MT (3) 44–19 OF 2000
SURIYADI J
8 NOVEMBER 2000

Administrative Law *— Remedies — Habeas corpus — Detention in drug rehabilitation centre — Non specification of supervising officer upon release from detention centre — Whether disclosure of identity of supervising officer is a right of the detainee — Whether habeas corpus should be granted*

The applicant had been detained under the Drug Dependants (Treatment and Rehabilitation) (Amendment) Act 1983 ('the Act') pursuant to an order pronounced by the magistrate under s 6(1)(b) of the Act. The applicant applied for an order of habeas corpus on the ground that the order of the magistrate was void because of the non-specification of the relevant party that was supposed to supervise him after his release from the detention centre.

Held, allowing the application:

(1) The statutory format that requires adherence by the presiding magistrate expands the scope of the terminology 'officer' to encompass a rehabilitation officer, a police officer, a provost officer and a commanding officer. In the present case, due to the failure of the magistrate to administratively delete the relevant portion of the typed order, the relevant supervising officer was not identified, thus jeopardizing the applicant's well being after his release. Had the deletion taken place, the unscathed required supervisor could easily have been identified (see pp 212E–213F).

(2) The magistrate had not applied his mind over the matter of supervision, particularly on the factor of the relevant officer when he failed to delete the irrelevant portion. Thus the supervising officer had not been identified. By this failure to identify that officer, the applicant would not know to whom to report after his release. The disclosure of the identity of the supervising officer was not just to assist but a right entrenched in the Act to enable him to locate that officer (see pp 214I–215A).

(3) As the detention was not in accordance with the procedure established by the law in that it was founded on a defective order, the applicant thus was entitled to his freedom (see p 215D).

[**Bahasa Malaysia summary**

Pemohon telah ditahan di bawah Akta Penagih Dadah (Rawatan dan Pemulihan) (Pindaan) 1983 ('Akta tersebut') menurut satu perintah

oleh majistret di bawah s 6(1)(b) Akta tersebut. Pemohon telah memohon satu perintah habeas corpus atas alasan bahawa perintah majistret tersebut adalah tidak sah kerana spesifikasi yang tidak diikuti oleh pihak relevan yang sepatutnya mengawas beliau setelah pembebasan beliau daripada pusat penahanan tersebut.

Diputuskan, membenarkan permohonan tersebut:

(1) Format statutori yang memerlukan kepatuhan oleh majistret yang bersidang memperluaskan skop terminologi 'pegawai' agar merangkumi seorang pegawai pemulihan, seorang pegawai polis, seorang pegawai provos dan seorang pegawai pemerintah. Di dalam kes ini, kegagalan majistret untuk melaksanakan pemotongan bahagian berkaitan perintah yang bertaip menyebabkan pegawai penyelia berkaitan tidak dikenalpasti, oleh itu menjejaskan kesejahteraan pemohon selepas pembebasan beliau. Sekiranya pemotongan tersebut dilaksanakan, penyelia berkaitan mungkin mudah dikenalpasti (lihat ms 212E, 213F).

(2) Majistret tidak menggunakan minda beliau berhubung perkara pengawasan, terutamanya mengenai faktor pegawai berkaitan ketika beliau gagal untuk memotong bahagian yang tidak berkaitan. Oleh itu, pegawai penyelia tidak dapat dikenalpasti. Dengan kegagalan untuk mengenalpasti pegawai tersebut, pemohon tidak akan mengetahui kepada siapa beliau harus melaporkan diri selepas beliau dibebaskan. Pendedahan identiti pegawai penyelia tersebut bukan sahaja berfungsi sebagai suatu bantuan tetapi merupakan satu hak yang termaktub di dalam Akta tersebut untuk membolehkan beliau mengesan pegawai tersebut (lihat ms 214I–215A).

(3) Memandangkan penahanan tersebut tidak menurut prosedur yang ditentukan oleh undang-undang iaitu perintah tersebut telah didapati tidak sah, pemohon oleh demikian berhak ke atas pembebasan beliau (lihat ms 215D).]

Notes

For cases on habeas corpus generally, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 390–437.

Cases referred to

Al Annamalai & Anor v Cjhandrasekaran a/l Thangavelu & Anor [1999] 3 AMR 2912 (refd)

Aw Ngoh Leang v Inspector General of Police & Ors [1993] 1 MLJ 65 (refd)

Cheow Siong Chin v Menteri Dalam Negeri, Malaysia & Ors [1985] 2 MLJ 95 (refd)

Datuk James Wong Kim Min; Minister of Home Affairs, Malaysia & Ors v Datuk James Wong Kim Min [1976] 2 MLJ 245 (refd)

Karam Singh v Menteri Hal Ehwal Dalam Negeri [1969] 2 MLJ 129 (refd)
Lee Weng Kin v Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors [1991] 2 MLJ 472 (refd)
Menteri Hal Ehwal Dalam Negeri & Anor v Lee Gee Lam and another application [1993] 3 MLJ 673 (refd)
Mok Han Liang v Timbalan Menteri Dalam Negeri, Malaysia & Ors [1996] 5 MLJ 74 (refd)
Onkar Shrian, Re [1970] 1 MLJ 28 (refd)
Ram Manohar Lohia & Ors v State of UP & Ors [1968] Cr LJ 281 (refd)
Zahir Ahmad v Ganja Prasad & Ors AIR 1963 All 4 (refd)

Legislation referred to

Criminal Procedure Code s 394
Drug Dependants (Treatment and Rehabilitation) (Amendment) Act 1983 ss 2, 6(1)(a), (b), (2), (3), Form 3
Federal Constitution art 5(2)

Wan Jawahir bte Hj Harun (*Wan Jawahir & Co*) for the applicant.
Mohamed Abazafree bin Mohd Abbas (Federal Counsel, Home Affairs Ministry) for the respondents.

Suriyadi J. : On 8 November 2000, I heard this habeas corpus application and eventually allowed it with costs. The background of this case was that the applicant had been detained under the Drug Dependants (Treatment and Rehabilitation) (Amendment) Act 1983 ('the Act'), pursuant to an order pronounced by the learned magistrate of Bachok, Kelantan on 13 September 2000. The applicant complained that that order, pursuant to s 6(l)(b) of the Act was flawed and thus void. He alleged that the flaw came in the form of the non-specification by the learned magistrate of the relevant party that was supposed to supervise him after his release from detention at the Tampoi Rehabilitation Centre. By this failure, his interest had been compromised and thus had prejudiced his person.

Interestingly enough, the complaint was only confined to the supervision matter per se, as the applicant never complained of the detention sanction. The legal poser that also attracted my attention was whether an order of habeas corpus could be granted in the circumstances of the case, bearing in mind that such an order is specifically reserved for illegal detentions, as envisaged by art 5(2) of the Federal Constitution. Under the latter article, the detainee is constitutionally entitled to be released before the High Court judge, ie after having successfully established wrongful detention. With no complaint pertaining to the actual detention in this case being ventilated, and since habeas corpus orders are only issued for illegal detentions, apart from the fact that at the point of time of the supervision he would be physically free, at first blush the application would appear to be a lost cause. The above predicament has had its fair share of controversy as reflected in certain case laws. In *Zahir Ahmad v Ganja Prasad & Ors* AIR

1963 All 4, the High Court opined that the fact that a detainee had been released on bail, did not mean that he was free. That being so, the habeas corpus application in that situation was in order. The latter case was subsequently approved by *Ram Manohar Lohia & Ors v State of UP & Ors* [1968] Cr LJ 281. The matter was opened wide again when Choor Singh J in *Re Onkar Shrian* [1970] 1 MLJ 28 disagreed with the above stance. He remarked:

> In my opinion this submission must also fail. The expression 'who claims to be brought before the court' refers to a person who is in actual custody and who claims the right to be brought before the court to be dealt with according to law, eg a defendant in custody under a writ of attachment.
>
> Such a person can claim to be brought before the court to be dealt with according to the law. It does not mean that any person can claim to be brought before the court. If that were so, then every person who desired the opinion of the High Court on some question or matter could 'claim to be brought before the court to be dealt with according to law.' I have no doubt at all that only a person in actual custody whose case is not covered by a paras (a) and (b) can claim the right to be brought before the High Court because 'brought before the court' means brought from actual custody.

Without making too much out of procedural matters pursuant to the Criminal Procedure Code ('the CPC'), suffice it I opine that the issue discussed by Choor Singh J, ie the matter of bail, is adequately provided for under chapter xxxviii of the CPC. Under s 394 of the CPC, any person aggrieved by any order may appeal to the High Court, which may confirm, vary or reverse the relevant order. The remedy of habeas corpus clearly is not within its ambit. At the flip side of the coin, in contradistinction to criminal matters, in *Al Annamalai & Anor v Cjhandrasekaran a/l Thangavelu & Anor* [1999] 3 AMR 2912, (a civil case substantially dealing with an adoption matter), I rejected the habeas corpus application there as the supposed kidnapped child, central to the adoption application, was in court when the proceedings were in session. As regards the habeas corpus remedy in relation to administrative law, it is trite law that when a person is subject to a restriction order signed by a minister, such a remedy is not available to him. Suffice if I merely reproduce the remark of Abdoolcader SCJ in *Cheow Siong Chin v Menteri Dalam Negeri, Malaysia & Ors* [1985] 2 MLJ 95 where he said:

> On a consideration of the authorities we have adumbrated, none of which, except for two, were referred to in the court below or before us, we are of the view that the restraint imposed by reason of an order of restricted residence under the enactment does not constitute detention of such a nature as to attract the application of the writ of habeas corpus.

It was based on all the above considerations, bearing in mind that the matter at hand was a quasi-criminal matter, what with the overall effect of a flawed order that could prejudice the interest of the applicant, and no less important the issue of whether the learned magistrate had consciously applied his mind when pronouncing that impugned order, I resolved not to dismiss the matter off-handedly.

To understand the matter at hand, it is rather pertinent for me to reproduce s 6(1)(a) of the Act. It reads as follows:

> Where a person who has undergone the tests referred to in s 3 or 4 and, in consequence to such tests, is certified by a government medical officer or a registered medical practitioner to be a drug dependant, the officer shall produce him, or cause him to appear before a Magistrate, and the Magistrate shall upon the recommendation of a Rehabilitation Officer and after giving such person an opportunity to make representations —
>
> (a) order such person to undergo treatment and rehabilitation at a Rehabilitation Centre specified in the order for a period of two years and thereafter to undergo supervision by an officer at the place specified in the order for a period of two years.

A brief perusal of the above provision will indicate that an order meted by a magistrate must contain two distinct forms of sanctions, viz a confinement at a rehabilitation centre for a period of two years, purposefully for treatment and rehabilitation, and further supervision by an officer at the place specified in that order, after the aggrieved party's release. In a gist, the confinement and the supervision requirement must go hand in hand, though the effective dates of those two prescribed sanctions take effect at different points in time. The above provision unfortunately does not clarify that particular supervising 'officer'. Even a scrutiny of s 2 confines the definition of 'officer' to 'any rehabilitation officer or any police officer' and no further. Yet, the statutory format that requires adherence by the presiding magistrate expands the scope of that terminology of 'officer' to encompass a rehabilitation officer, a police officer, a provost officer and a commanding officer. Clearly, this unsatisfactory definition needs immediate attention from the relevant authority. A choice will have to be made by the learned magistrate here, with the irrelevant portion in the statutory form to be administratively deleted prior to pronouncing the order. To appreciate this problem, a reading of that format which is found at the rear portion of the Act referred to as Form 3, is a must. I now reproduce it:

> FORM 3
>
> DRUG DEPENDANTS (TREATMENT AND REHABILITATION) 1983
>
> (Paragraph 6(1)(a) and sub-s 6(2))
>
> ORDER TO UNDERGO TREATMENT AND REHABILITATION AT A REHABILITATION CENTRE AND TO UNDERGO SUPERVISION
>
> Whereas ..... Identity Card No ..... aged ..... years of (hereafter referred to as 'the said person'), is certified by ..... A * government medical officer/registered medical practitioner to be a drug dependant within the meaning of the Act:
>
> And whereas upon the recommendation of the Rehabilitation Officer, And after giving the said person an opportunity to make a representation I, ... a Magistrate at ..... order the said person —
>
> (a) to undergo treatment and rehabilitation at ..... Rehabilitation Centre for a period of two years; and

(b) thereafter to undergo supervision by *Rehabilitation Officer/police officer/provost officer/commanding officer for a period of two years under the following conditions:

(i) the said person shall reside in the area of .....

(ii) the said person shall at all times inform the officer of his place of residence and shall not change his place of residence or leave the area where he resides without the written permission of the Director General;

(iii) the said person shall report at the .....(as designated) by the Magistrate) not later than 72 hours after his discharge from the rehabilitation centre and on the ..... of every calendar month between 6.00 am and 6.00 pm;

(iv) the said person shall not consume, use or possess any dangerous drugs;

(v) the said person shall undergo such tests at such time and place as may be ordered by the officer; and

(vi) the said person shall undergo any programme for the rehabilitation of drug dependants held by the government.

Given under my hand and the seal of the Court at ..... on .....

.....
(Magistrate)

The expansion of the scope of the supervising personality, to include a provost officer or commanding officer, is indisputably for the benefit of soldiers that have gone astray. The citation of those officers in the statutory form is in consonant with s 6(2) of the Act, which makes mention of members of the armed forces. To summarise this provision, a detainee after his release, depending on his status or discretion of the learned magistrate, is statutorily required to be supervised by one of the four distinct persons (s 6(1)(a)). In this case, it was quite clear to me that by the very failure of the learned magistrate to administratively delete the relevant portion of the typed order, the relevant supervising officer was not identified, thus jeopardizing the applicant's well being after his release. Had the deletion taken place, the unscathed required supervisor could easily have been identified.

To pursue the matter further, I could appreciate the dire predicament the applicant would find himself under after his release, in the event that he fails to report to the correct person primarily to fulfill the second part of the order. Is he to report to a rehabilitation officer, a police officer, a provost officer or a commanding officer of some unknown unit in the armed forces? Any reasonable person could well imagine his confusion or dilemma due to the shortcomings of the order. It is established law that it is incumbent on the detaining authority, in this case the respondent, to prove that the order is ex facie regular (*Karam Singh v Menteri Hal Ehwal Dalam Negeri* [1969] 2 MLJ 129; *Lee Weng Kin v Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors* [1991] 2 MLJ 472). In this case, unfortunately due to the delay in filing the affidavit in reply by the respondent, resulting in it being rejected, the respondent was left without any rebuttal evidence. On the other hand, the respondent could not complain of being in a disadvantageous position, as

in spite of its predicament, it was never denied the opportunity to defend and justify the defective order from the Bar table. Sad to say, the respondent was hard pressed to convince me that the order was ex facie regular.

Furthermore, with the failure to comply with the second part of the order, *and through no fault of his*, a prosecution by the public prosecutor would not be an improbability. Section 6(3) of the Act clearly reads:

> Any person undergoing supervision under para (a) or (b) of sub-s (1) who fails to comply with any condition imposed under sub-s (2) shall be guilty of an offence and shall on conviction be liable to be punished with imprisonment for a period not exceeding three years or to whipping not exceeding three strokes or to both.

Even if he were not to be prosecuted eventually, the fact that that probability did hang like the Sword of Damocles over his head for a long time, clearly would go against his welfare and interest. KC Vohrah J, when reading out the Supreme Court judgment of *Aw Ngoh Leang v Inspector General of Police & Ors* [1993] 1 MLJ 65 took a step further when his Lordship adjudged:

> Any disobedience of the mandatory requirements for the protection of this right would vitiate any order of detention made even *if no real prejudice has ensued* to the detainee. (Emphasis added.)

This court order, by analogy, is no different from a detention order issued by a minister against anyone, eg pursuant to the Internal Security Act 1960. The minister, before signing the order, is expected to adhere to certain practices and standards, inter alia, to appreciate and apply his mind to the matter before taking the draconian step of confining a person without due process. Similarly, the magistrate is expected to consciously apply his mind to the matter, instead of robotically and in a cavalier manner just sign away the impugn order (*Mok Han Liang v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [1996] 5 MLJ 74; *Menteri Hal Ehwal Dalam Negeri & Anor v Lee Gee Lam and another application* [1993] 3 MLJ 673). To wind up the matter, suffice if I refer to the case of *Datuk James Wong Kim Min; Minister of Home Affairs, Malaysia & Ors v Datuk James Wong Kim Min* [1976] 2 MLJ 245, where Lee Hun Hoe CJ Borneo at p 251 said:

> Where the detention cannot be held to be in accordance with the procedure established by the law, the detention is bad and the person detained is entitled to be released forthwith. Where personal liberty is concerned an applicant in applying for a writ of habeas corpus is entitled to avail himself of any technical defects which may invalidate the order which deprives him of his liberty.

I further seek solace from the recent case of MT (1) 44–10–2000, which was heard by my learned brother ldris J, whereupon a habeas corpus order was similarly granted. Likewise, in that case, the learned magistrate had failed to delete the relevant portion. After having considered all the factors ventilated during the hearing, I concluded, among others that:

(i) the learned magistrate had not applied his mind over the matter of supervision, particularly on the factor of the relevant officer, when he failed to delete the irrelevant portion;

(ii) the supervising officer had not been identified;

(iii) by this failure to identify that officer, the applicant would not know to whom to report to after his release. The disclosure of the identify of the supervising officer is not just to assist, but is a right entrenched in the Act to enable him to locate that officer;

(iv) in the event that he fails to report to anyone in order to comply with the second part of the order (and through no fault of his), the applicant would become a potential target to a prosecution. It was manifestly clear that his rights and interest would be compromised and prejudiced by the lackadaisical attitude of the learned magistrate;

(v) the personal liberty of the applicant was inextricably intertwined with the supervision factor;

(vi) he was entitled to avail himself to any technical defects which could invalidate the order;

(vii) at the point of time when the supervision becomes effective, he physically will be a free man; but

as the detention was not in accordance with the procedure established by the law in that it was founded on a defective order, the applicant thus was entitled to his freedom.

Based on all the above factors I had no hesitation in allowing the application with costs.

Application allowed.

Reported by Jafisah Jaafar